

DISCIPLINE FOR FAILURE TO PAY CHILD SUPPORT

by
Marcia A. Johnson, Director
Minnesota Office of Lawyers Professional Responsibility

Reprinted from *Bench & Bar of Minnesota* (Sept. 1996)

On June 13, 1996, the Supreme Court approved new Rule 30, Rules on Lawyers Professional Responsibility. The rule provides for administrative suspension of attorneys who are in arrears in paying child support or maintenance. The text of the rule can be found below:

RULE 30. ADMINISTRATIVE SUSPENSION

(a) Upon receipt of a district court order or a report from an Administrative Law Judge or public authority pursuant to Minn. Stat. § 518.551(12) finding that a licensed Minnesota attorney is in arrears in payment of maintenance or child support and has not entered into or is not in compliance with an approved payment agreement for such support, the Director's Office shall serve and file with the Supreme Court a motion requesting the administrative suspension of the attorney until such time as the attorney has paid the arrearages or entered into or is in compliance with an approved payment plan. The Court shall suspend the lawyer or take such action as it deems appropriate.

(b) Any attorney administratively suspended under this rule shall not practice law or hold himself or herself out as authorized to practice law until reinstated pursuant to paragraph (c). The attorney shall, within 10 days of receipt of an order of administrative suspension, send written notice of the suspension to all clients, adverse counsel and courts before whom matters are pending and shall file an affidavit of compliance with this provision with the Director's Office.

(c) An attorney administratively suspended under this rule may be reinstated by filing an affidavit with supporting documentation averring that he or she is no longer in arrears in payment of maintenance or child support or that he or she has entered into and is in compliance with an approved payment agreement for payment of such support. Within 15 days of the filing of such an affidavit the Director's Office shall verify the accuracy of the attorney's affidavit and file a proposed order for reinstatement of the attorney requesting an expedited disposition.

(d) Nothing in this rule precludes disciplinary proceedings, if the attorney's conduct also violates the Minnesota Rules of Professional Conduct.

The rule met with little controversy during the notice and comment period provided by the Court, nor fanfare after its implementation. In fact, the new rule seeks only to hold attorneys accountable for child support and maintenance in the same manner as other licensed professionals in Minnesota.

ADDRESSING THE PROBLEM

Nonpayment of child support has become a major social problem in Minnesota and the country. Defalcations in courtordered child support in Minnesota amounted to \$551 million in 1994 and \$604 million in 1995, according to the figures compiled by the Attorney General's Office. These numbers certainly aren't just about lawyers. But sadly, lawyers are included in these numbers. In the past year or two, the Director's Office has received complaints alleging lawyers to be in arrears in support or maintenance payments to the

tune of \$60,000 to \$100,000.

Many collection techniques have been utilized by state child support enforcement agencies. Most of the efforts have proved both costly and ineffective. Federal law is now requiring states to use driver's license and occupational license revocation as a tool for enforcing child support and maintenance orders. Data available to date indicates that the threat of license revocation is a very effective and efficient tool for enforcing support orders.

In 1992, the Minnesota Legislature first enacted a statute (Minn. Stat. § 518.551(12)) providing for occupational license suspension for failure to pay child support. If the obligor is an attorney, because of constitutional separation of powers, the agency may report the matter to the Lawyers Professional Responsibility Board for "appropriate action in accordance with the Rules on Lawyers Professional Responsibility." The clear intent of the Legislature, while it could not mandate that result, was that the Lawyers Board also act so as to suspend an attorney's license for failure to pay child support.

In the spring of 1995, the Legislature amended Minn. Stat. § 518.551 to provide for additional procedural due process *before* reporting noncompliance to the licensing agency or the Director's Office. Before a public support agency makes a report of noncompliance to a licensing agency, the obligor must be three months in arrears in payments; the obligor has the opportunity to enter into a payment program; or the obligor has the right to a fully contested administrative hearing before an administrative law judge with appellate rights as set out in the Administrative Procedure Act.

As a result of the statutory changes, the Lawyers Board proposed the adoption of *administrative* suspension under its procedural rules. The Board's primary goals for dealing with this issue were to ensure fair treatment for lawyers, but also treatment that is as equal as possible to other occupational license-holders in this state. The advantages of administrative suspension are substantial: (1) the procedure is much faster and uses fewer scarce disciplinary resources than procedures under the Minnesota Rules of Professional Conduct; (2) as a support enforcement tool it provides a procedure which is as close to the treatment received by other occupational license holders as possible; (3) where noncompliance does not indicate unprofessional conduct, attorneys will not have a disciplinary record; and (4) when an administratively suspended attorney becomes in compliance, there is an expeditious reinstatement process.

A BALANCED APPROACH

States that have specifically addressed failure to pay child support as it relates to lawyers have taken primarily two different tracks. Some, like Minnesota, use an administrative suspension approach. In Indiana, for example, upon receipt of an order from a court stating that an attorney has been found to be intentionally delinquent in the payment of child support, the lawyers discipline system files notice with the Supreme Court seeking the attorney's suspension. The attorney is given notice and 15 days to respond. Other states have made failure to pay child support a disciplinary infraction. In Montana, notification to the Supreme Court of willful failure to pay child support will cause the Court to issue an order to show cause, in which the attorney has no right to relitigate the merits of the contempt order.

Not surprisingly, both administrative and disciplinary suspension proceedings in other states have tended to be summary in nature. The rationale therefore is clear. To suspend an attorney for professional misconduct via a state's substantive rules of conduct and normal procedural rules is a lengthy process with multiple layers of review. For example, in Minnesota, before a lawyer is publicly disciplined, he or she has the right to a hearing by a Lawyers Board panel, a Supreme Court referee, and the Supreme Court. The

delay inherent in proceeding in the normal course would certainly thwart the enforcement impact for child support purposes.

In Minnesota, Rule 30 provides a balanced approach. Administrative suspension should provide a reasonably prompt and efficient means to enforce child support, and willful or intentional violations of a court order can also be handled under the Minnesota Rules of Professional Conduct, resulting in professional disciplinary sanctions in egregious cases.